

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DIANA L. VALADEZ
Claimant

VS.

DILLARD DEPARTMENT STORES
Respondent
Self-Insured

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Docket No. 216,117

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Jon L. Frobish on July 14, 1997. The Appeals Board heard oral argument November 14, 1997.

APPEARANCES

Claimant appeared by her attorney, Dennis L. Phelps of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Eric T. Lanham of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Respondent requested the Board to review the following issues:

- (1) The nature and extent of claimant's disability.
- (2) The amount of compensation due as a result of such disability, if any.

- (3) Whether or not claimant is entitled to work disability and, if so, the amount of compensation due.

The dispute in this case focuses primarily on the findings by the Administrative Law Judge as to claimant's average weekly wage before and after the accident. Respondent contends that claimant's average weekly wage after the accident was more than 90 percent of claimant's preinjury wage and the Award should, therefore, be limited to functional impairment only, citing K.S.A. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrative Law Judge awarded benefits for a 20 percent work disability, and the Appeals Board concludes the Award should be affirmed.

Claimant began working for respondent as a sales representative in the furniture department on May 19, 1996. Claimant injured her low back on July 28, 1996, while moving furniture. After initial treatment at the Minor Emergency Center by Dr. David G. Lehr, claimant was treated by Dr. Michael P. Estivo from September 1996 through December 1996. He diagnosed a herniated disc at L5-S1 and recommended claimant consider surgery. He also recommended physical therapy and anti-inflammatory medication. Claimant decided not to undergo surgery and returned to work January 20, 1997. She initially worked as an office assistant and then in April 1997 was transferred to the lingerie department.

Prior to the injury at issue in this case, respondent paid claimant on a commission basis with an \$8 per hour draw against the commission. Claimant also received a bonus for certain kinds of sales. Her income is summarized in claimant's Exhibit 1 to the regular hearing of April 30, 1997.

As a person who is paid on a commission basis, claimant's average weekly wage is calculated in accordance with K.S.A. 44-511(b)(5) as follows:

If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be

In this case the dispute concerns how many weeks should be divided into the total amount of claimant's earnings prior to the injury. Respondent argues that the total amount of earnings should be divided by ten weeks. The claimant asks the Appeals Board to divide by only nine. The Administrative Law Judge divided the total by nine weeks; and the Appeals Board agrees. The first week claimant worked she worked only a total of 20.3 hours. The evidence in the record does not fully explain claimant's first week but it appears from the number of hours worked that it was only a partial work week, even if she started working at the beginning of that week. Although fractions of a week are used for other calculations under the Act, the record does not show how many hours were considered a full week. The fraction of a full week cannot be calculated. For commission work, the number of hours worked per week frequently is not the focus. The Board, therefore, considers it more appropriate to calculate average weekly wage for a commission employee on the basis of full weeks only, rather than attempt to calculate partial weeks on the basis of number of hours worked. The Board notes one other week when claimant worked only 27.6 hours, but that week is not in dispute. The Board finds, from the evidence, claimant worked only nine full weeks prior to her accident. When the amount claimant earned the first week, \$162.40, is deducted from the total amount of earnings and the result divided by nine weeks, one arrives at the average weekly wage found by the Administrative Law Judge of \$409.19.

The Appeals Board also agrees with the finding by the Administrative Law Judge relating to the wage after claimant's injury. Respondent introduced computer printouts showing the amount of gross pay claimant received each week after the injury. The Administrative Law Judge divided the total gross pay by the number of weeks to arrive at an average weekly wage, post-injury, of \$316.40. Again, the Appeals Board agrees.

Respondent contends that the Administrative Law Judge erred by not including amounts shown on those printouts under the heading "DFC/TIPS." Respondent's witness, Richard Jeans, testified that those amounts were for tips and were paid in addition to the gross amount otherwise shown on the records. The Appeals Board finds, nevertheless, it unlikely that amount is an amount in addition to the gross pay. First, the Appeals Board notes that the amount shown under "DFC/TIPS" is for each week identical to the amount shown under the category of "FCA" which the witness has otherwise identified as the social security withholding. It seems highly improbable that this would be a mere coincidence. The witness, when asked if the amount shown under "DFC/TIPS" was in addition to gross amount, actually testified as "yes, it should be." Finally, the Board notes that the term "gross" generally is understood to include all pay. For these reasons the Appeals Board concludes that it is more probably true than not that the gross amount shown on claimant's payroll records includes all of the amount of her pay and was appropriately used as the total pay by the Administrative Law Judge in arriving at the post-injury average weekly wage of \$316.40.

The Appeals Board also agrees with and affirms the finding that claimant's work disability was 20 percent. The only opinion of a physician regarding task loss is that of

Dr. Michael Estivo. He adopts the task loss assessed by Mr. Jerry Hardin. Mr. Hardin was asked to eliminate any duplicative tasks and in so doing arrived at a 17 percent task loss. The 17 percent task loss, averaged together with the 23 percent wage loss yields the 20 percent work disability which the Administrative Law Judge found and the Appeals Board hereby adopts.

Respondent also contends that the claimant was overpaid temporary total disability benefits. Claimant was paid temporary total disability benefits for 21.28 weeks at the rate of \$286.68 per week. Using its proposed lower average weekly wage, respondent contends that claimant was overpaid \$700.96. The Award by the Administrative Law Judge calculates the temporary total disability benefit based upon the preinjury wage of \$409.19. The appropriate temporary total disability rate, based upon that wage, is \$272.81. The Administrative Law Judge awarded temporary total disability benefits at the rate of \$272.81 and, after calculating the total amount due, provides that is the amount to be paid less sums previously paid. The Award, therefore, makes a small adjustment in the amount of temporary total disability benefits and does so in accordance with the finding of an average weekly wage of \$409.19. The Appeals Board finds that this aspect of the Award should also be affirmed.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge Jon L. Frobish, dated July 14, 1997, should be, and the same is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Diana L. Valadez, and against the respondent, Dillard Department Stores, a qualified self-insured, for an accidental injury which occurred July 28, 1996, and based upon an average weekly wage of \$409.19 for 21.28 weeks of temporary total disability compensation at the rate of \$272.81 per week or \$5,805.40, followed by 81.74 weeks at the rate of \$272.81 per week or \$22,299.49, for a 20% permanent partial general body disability, making a total award of \$28,104.89.

As of December 3, 1997, there is due and owing claimant 21.28 weeks of temporary total disability compensation at the rate of \$272.81 per week or \$5,805.40, followed by 49.15 weeks of permanent partial compensation at the rate of \$272.81 per week in the sum of \$13,408.61 for a total of \$19,214.01, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$8,890.88 is to be paid for 32.59 weeks at the rate of \$272.81 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders by the Administrative Law Judge as stated in the Award.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Eric T. Lanham, Kansas City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director